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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 541

GERTRUDE VANDERBILT WHITNEY AND CORNELIUS VANDERBILT, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT, DECEASED, ET AL.,

Appellants,

vs.

STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE SURROGATE'S COURT OF NEW YORK COUNTY OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

ROY C. GASSER,
ARTHUR A. BALLENTINE,
HORACE R. LAMB,
THOMAS B. GILCHRIST,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

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No. 541

GERTRUDE VANDERBILT WHITNEY AND CORNELIUS VANDERBILT, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT, DECEASED, AND SAID CORNELIUS VANDERBILT, INDIVIDUALLY, GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA MORGAN VANDERBILT, INFANT, AND THOMAS B. GILCHRIST, AS GENERAL GUARDIAN OF THE PROPERTY OF SAID INFANT,

against *Appellants,*

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT.

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in the above-entitled cause.

(1) The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States to entertain the appeal in this case are Section 237(a) of the Judicial

Code of the United States, as amended (28 U. S. C. A. § 344 (a)) and Section 1 of the Act of Congress of January 31, 1928 (c. 14, 45 Stat. 54), as amended by the Act of Congress of April 26, 1928 (c. 44, 45 Stat. 466), which provide that the Supreme Court of the United States may review, upon appeal, a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

(2) The statute of the State of New York, the validity of which is drawn in question in this case, is Article 10-C of the New York Tax Law (Laws of 1909, c. 62, constituting Chapter 60 of the Consolidated Laws of New York, as amended by Laws of 1930, c. 710, and as amended by Laws of 1932, c. 320), and in particular, subdivision 7-a of Section 249-r of said Article 10-C. Section 249-n of said Article 10-C imposes a tax upon the transfer of the net estate of every person dying after the effective date of said Article 10-C (September 1, 1930), who at the time of death was a resident of the State of New York. Section 249-r of said Article 10-C prescribes the manner of determining the value of the gross estate of the decedent, the introductory portion of such Section 249-r being as follows:

> "§ 249-r. Gross Estate. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this state):"

Subdivision 7 of Section 249-r requires the inclusion of property passing under a general power of appointment

exercised by the decedent. Then follows subdivision 7-a, which reads as follows:

> "7-a. To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth, exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise therof."

The full text of Section 249-r of said Article 10-C is annexed hereto as Exhibit A.

Said Article 10-C, as originally enacted in 1930, was modeled upon the Federal Estate Tax Law. It contained subdivision 7, corresponding to a provision in the Federal Estate Tax Law, requiring the inclusion in the taxable estate of property passing under general powers of appointment; but it did not contain subdivision 7-a, which has no counterpart in the Federal Estate Tax Law. Such subdivision 7-a was enacted separately in 1932 as an amendment to said Article 10-C.

(3) The decision and final judgment and order of affirmance of the Court of Appeals was entered July 11, 1939. The order of the Surrogate's Court on the remittitur of the Court of Appeals was entered August 22, 1939. The application for an appeal herein is presented on this 10th day of October, 1939, to the Hon. Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

(4) For a statement of the nature of the case and the rulings of the State courts, and the basis upon which it is contended that this Court has jurisdiction of the cause under Section 237(a) of the Judicial Code, the appellants respectfully show:

This is a proceeding for the assessment of estate tax upon the estate of Alice G. Vanderbilt, deceased, late a resident of the State of New York, under Article 10-C of the New York Tax Law (Consolidated Laws of New York, c. 60). Said deceased, hereafter called the decedent, died testate on April 22, 1934. By her will she carried out a trust imposed on her by the will of her husband Cornelius Vanderbilt, by exercising a special or limited power of appointment over property of the estate of her husband. The appellants Gladys Szechenyi, Cathleen Vanderbilt Lowman and Gloria Laura Morgan Vanderbilt (all being issue of Cornelius and Ailce G. Vanderbilt, deceased), together with Gertrude Vanderbilt Whitney and the issue of Alfred G. Vanderbilt, were the appointees of the property passing by the exercise of such special or limited power of appointment. The appellants Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the will of the decedent, are the persons charged by the New York Tax Law with making the return for and paying the estate tax from the taxable estate of the decedent, as provided in the Tax Law.

Upon the petition and estate tax return filed by the appellant executors, and upon the report of the estate tax Appraiser, a *pro forma* order assessing estate tax upon the estate of the decedent was entered in the Surrogate's Court of the County of New York on July 13, 1936. This *pro forma* order included the entire value of the property of the estate of Cornelius Vanderbilt appointed by the decedent pursuant to such special or limited power of appointment as part of the taxable estate of the decedent on the

ground that such inclusion was required by subdivision 7-a of Section 249-r of Article 10-C, quoted above at pp. 2-3.

From this *pro forma* order the appellants duly took an appeal to Honorable James A. Foley, one of the Surrogates of the County of New York, pursuant to Section 249-x of said New York Tax Law. The proceedings on such appeal and in the said Surrogate's Court, the court of first instance of this cause, constituted the first judicial proceedings in the matter. Such proceedings were instituted by several notices of appeal filed by these appellants, in each of which it was expressly assigned as grounds of the appeal that the estate tax assessed was erroneous and illegal, for the reason that in so far as said Article 10-C purports to require the inclusion of the said appointed property in the gross estate of the decedent for the purpose of measuring the tax, said Article 10-C is unconstitutional in that it deprives the appellants of their property without due process of law and denies to them the equal protection of the laws, in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States (R. 121-138, fols. 361-413).

Upon hearing the case, Surrogate Foley, on June 7, 1937, filed an opinion and decision (163 Misc. 667), appended hereto as Exhibit B, in which, among other things, he held:

> "Finally there is no unconstitutionality in the inclusion by the Legislature of a statutory declaration that a fund subject to a *limited* power shall be deemed to be part of the grantee's property. I have pointed out that the question of the constitutionality of the legislative authority to levy that form of taxation was set at rest many years ago by the United States Supreme Court. (Chanler *v.* Kelsey, 205 U. S. 466, sustaining Matter of Delano, 176 N. Y. 486; Orr *v.* Gilman, 183 U. S. 278, sustaining Matter of Dows, 167 N. Y. 227; Matter of Zborowski, 213 N. Y. 109.)"

Pursuant to said opinion and decision an order of the Surrogate's Court of the County of New York was made and filed September 28, 1937. This order modified the aforesaid *pro forma* taxing order so as to exclude from the decedent's gross estate $650,000 appointed by the decedent to Gertrude Vanderbilt Whitney and to the issue of Alfred G. Vanderbilt, on the ground that the amount they received under the appointment was less than they would have received if the power had not been exercised. See *Matter of Duryea*, 277 N. Y. 310 (1938). However, the order of the Surrogate's Court affirmed the aforesaid *pro forma* taxing order in so far as it included in the gross estate of the decedent the appointed property involved in the appeal herein sought. This order

> "Ordered and Adjudged that the provisions of subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, in so far as the provisions thereof are hereby held to be applicable to the trust fund created by the Seventh Article of the will of said Cornelius Vanderbilt, deceased, over which the decedent Alice G. Vanderbilt exercised by Article Third of her will the special or limited power of appointment granted to her by the Eighth Clause of said will of Cornelius Vanderbilt are valid and constitutional and do not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States * * *; and that the inclusion of the value of said trust fund to the extent herein directed in the gross estate of said Alice G. Vanderbilt, deceased, for the purposes of assessing, fixing and determining the estate tax upon the estate of said Alice G. Vanderbilt, deceased, does not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States * * *."

Thereafter, as provided by the laws of New York, these appellants duly took appeals from said order to the Appellate Division of the Supreme Court of the State of New

York in and for the First Judicial Department. Such appeals were instituted by the appellants' several notices of appeal from each and every part of said order (except so much thereof as had sustained the appeals and excluded the $650,000 mentioned above) (R. 2-8, fols. 5-23). The said Federal questions were thereby directly and necessarily presented to the Appellate Division for review. Upon hearing said appeals the Appellate Division, upon its unanimous decision rendered without opinion, entered an order on October 28, 1938, affirming the order of the Surrogate appealed from. (R. 104-105, fols. 310-315).

These appellants then duly took appeals from said order of the Appellate Division, to the Court of Appeals of the State of New York, under Section 588 of the New York Civil Practice Act. Such appeals were instituted by the appellants' joint notices of appeal from each and every part of the order of affirmance of the Appellate Division, and such appeals directly and necessarily presented to the Court of Appeals the Federal questions herein sought to be reviewed by the Supreme Court of the United States (R. 165-170, fols. 493-510). Upon hearing such appeals, the Court of Appeals on July 11, 1939, handed down an opinion sustaining the validity of the statute in question (281 N. Y. 297), a copy of which is appended hereto as Exhibit C.

In deciding the Federal constitutional questions against the contention of the appellants, the Court of Appeals declared in part:

> "The serious question in this case is whether the tax violates the Constitution of the United States."

The Court of Appeals decided that question in the negative. The questions whether the tax statute, as applied, violates the equal protection and due process clauses of the Fourteenth Amendment were raised in the Surrogate's Court, were saved by the various notices of appeal, were pre-

sented to each of the State courts by brief and oral argument, and were necessarily decided by them.

Pursuant to the decision of the Court of Appeals, the clerk of that court entered a final judgment and order of affirmance of the order of the Appellate Division on July 11, 1939 (R. 173-175). By this judgment and order of affirmance, the cause was duly remitted to the Surrogate's Court of New York County. The remittitur having been filed in the said Surrogate's Court, an order was made by said Surrogate's Court on August 21, 1939, and entered on August 22, 1939, making the order of affirmance of the Court of Appeals the final order of the said Surrogate's Court (R. 191-193).

(5) For a statement of the grounds upon which it is believed that the questions involved in the cause are substantial, the appellants respectfully show:

The decedent was the widow of Cornelius Vanderbilt, who died on September 12, 1899 (R. 81, fol. 243). By his will, Cornelius Vanderbilt created a trust for the payment of an annual income of $250,000 to the decedent, and gave the remainder of this trust fund to four named children and their issue (and to any child born after his death) in such proportions as his wife might appoint in her will, the trust fund to be divided equally in default of such appointment.

The power which the decedent thus received was, under the law of New York, a *special power in trust*, which the doctrine of equitable fraud forbade her to exercise for her own purposes. As the Court of Appeals has held, the decedent's power of appointment

> "was not general. By its exercise she could obtain no benefit for herself, her creditors or her estate. * * * When she exercised that power she gave her appointees nothing which belonged to her and she relinquished no

rights which she might have asserted for herself. Nevertheless, the transfer of that property has been taxed in her estate and not in the estate of Cornelius Vanderbilt. The tax so imposed is many times greater than it would have been if the transfer had been taxed in the estate of the donor of the power" (R. 179).

The Court of Appeals construed subdivision 7-a of Section 249-r as requiring the appointed property (except the $650,000 mentioned above) to be included in the gross estate of the decedent. The effect of including in the gross estate of the decedent the property appointed under the special power in trust was to increase the total estate taxes payable by approximately $852,000. Of this additional amount, about $165,000 was imposed in respect of the decedent's own property, the increase being due to the fact that the rates of the New York estate tax are progressive and the inclusion of the appointed property in the gross estate caused the estate to fall into a higher bracket. The tax imposed in respect of the appointed property was approximately $660,000 greater than if it had been taxed in the estate of Cornelius Vanderbilt, and approximately $155,000 greater than if it had been subjected to an estate tax at the present rates, but not aggregated with the decedent's own property.

The inclusion in the estate of the decedent, for the purpose of measuring a progressive estate tax, of property in which the decedent never had any beneficial interest but over which she exercised merely a special or limited and wholly non-beneficial power of appointment, raises questions, both under the due process and under the equal protection clause of the Fourteenth Amendment, which have never come before this Court.

The case also presents a question under the equal protection clause of the Fourteenth Amendment, arising out of the chronological classification which, by subdivision 7-a of Section 249-r, is attempted to be made between trans-

actions subject to the tax and those not subject to it. On this question there is recent authority in this Court which appellants believe establishes that such a classification violates the equal protection clause.

The appellants respectfully submit that the Federal constitutional questions, properly raised and necessarily decided by the State courts and now before this Court on appeal, are substantial Federal questions within the rule of *Zucht* v. *King*, 260 U. S. 174, 176, 177 (1922).

It cannot be contended that they are "so absolutely devoid of merit as to be frivolous." Compare *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311 (1902). The Court of Appeals itself, in the passage from its opinion quoted above, has expressly characterized the constitutional aspect of the case as a serious one.

Nor can it be urged that they have "been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy." *Ibid.* The opinion of the Court of Appeals does not purport to be based upon any decision of the United States Supreme Court. On the contrary, the entire effort of the opinion is to distinguish various decisions of the Supreme Court in which provisions of tax statutes had been found to be in conflict with the Constitution. After reviewing such decisions, the Court of Appeals states:

> "The facts present in this case are so different from those presented in the cited cases that they furnish, at best, imperfect analogies."

(a) *Due Process Question.* The question whether the due process clause of the Fourteenth Amendment permits the inclusion in the estate of a decedent, for the purpose of measuring a progressive estate tax, of property in which the decedent never had any beneficial interest, but over which the decedent had merely a special or limited and

wholly non-beneficial power of testamentary appointment, is a substantial Federal question.

This Court has never had occasion to pass upon this issue directly. Although the Federal Estate Tax Law has for many years (ever since the Revenue Act of 1918) required the inclusion in the decedent's taxable estate of property passing under a general power of appointment exercised by the decedent, it has never contained a provision purporting to subject to the Federal estate tax property in respect of which the decedent had only a special or limited power of appointment.

The inclusion in the decedent's taxable estate of the property here in question involves an arbitrary and erroneous factual assumption that the decedent stood in a relation to this property which was substantially the equivalent of ownership. The appellants urge that, by sanctioning this arbitrary factual assumption of the Legislature, the decision of the Court of Appeals conflicts with the principle enunciated in *Hooper* v. *Tax Commission*, 284 U. S. 206, 215 (1931) and *Heiner* v. *Donnan*, 285 U. S. 312, 325 (1932). The prior decisions of this Court, far from foreclosing the question against the appellants, go a long way toward foreclosing it in their favor. It is therefore a substantial question deserving review.

(b) *First Equal Protection Question.* The question whether the equal protection clause permits the State to tax the decedent's estate more heavily than the estate of a decedent having the same amount of beneficially owned property but exercising no special or limited power of appointment, is a substantial Federal question.

In this connection, it should be observed that the Constitution imposes upon the States a more exacting requirement of fairness than is placed on the Federal Government. The Federal Government is subject only to the prohibition

against deprivation of property without due process of law, but the States are subject also to the equal protection clause. *La Belle Iron Works v. United States*, 256 U. S. 377, 392 (1921); *Barclay & Co. v. Edwards*, 267 U. S. 442, 450 (1924); *Heiner v. Donnan*, 285 U. S. 312, 338; 347-348 (1932) (Stone, J., dissenting). Therefore even if it should be held that inclusion of the appointive property in the estate on the basis of the capricious factual assumption that it "belonged" to the decedent does not violate the due process clause, it nevertheless seems plain that the *arbitrary classification* produced by the application of that factual assumption violates the equal protection clause.

The precise import of this equal protection question is the more readily perceived when it is recalled that, by the aggregation of appointive property with property beneficially owned by the decedent, the tax imposed *in respect of the latter* has been increased by some $165,000. If the decedent had not been granted or had not exercised the special or limited power of appointment, the tax imposed in respect of her own property would have been $165,000 less, even though she would have had no less property to give, and the recipients of her own property would have received no less than they actually did.

This Court has held that "A classification for purposes of taxation must rest on some reasonable distinction." *Schlesinger v. Wisconsin*, 270 U. S. 230, 240 (1926); *Louisville Gas Co. v. Coleman*, 277 U. S. 32 (1928); *Colgate v. Harvey*, 296 U. S. 404 (1935). The difference in treatment here complained of rests on no such reasonable distinction.

This question is not foreclosed by the prior decisions of this Court, and is a substantial question deserving review.

(c) *Second Equal Protection Question.* The question whether the equal protection clause of the Fourteenth

Amendment permits the State to tax the decedent's estate more heavily than the precisely similar estate of a decedent who exercises a special or limited power of appointment created after September 1, 1930, is a substantial Federal question.

Under the New York Tax Law, property passing under a special or limited power of appointment is included in the estate of the grantee of the power if, but only if, it was not subject to a death tax in the estate of the grantor of the power, and since upon the enactment of Article 10-C, effective September 1, 1930, all appointive property became subject to a death tax (the new estate tax) upon the death of the grantor of the power (such property being as much a part of the grantor's estate for the purpose of this tax as any of his other property), it is clear that the applicability of subdivision 7-a depends on whether the power of appointment involved was created before September 1, 1930, in which case subdivision 7-a may apply, or after September 1, 1930, in which case subdivision 7-a can never apply.*

This Court has squarely held that such a chronological classification in a death tax statute is arbitrary and capricious and constitutes a denial of the equal protection of the law. *Binney* v. *Long*, 299 U. S. 280 (1936).

We submit that this recent decision of the United States Supreme Court is alone a sufficient basis for reversal of the decision of the court below in the present case. It follows that the question is a substantial one and deserves review.

(6) The following cases support the jurisdiction of the Supreme Court in this cause: *Salomon* v. *State Tax Commis-*

* Between April 2, 1925, and September 1, 1930, the period when Article 10-B was operative, appointive property was subject to a death tax in the estate of a resident grantor of a power, not in all cases, but whenever his net estate was of a certain minimum value as prescribed in Article 10-B.

sion, 278 U. S. 484 (1929); *Funkhouser* v. *J. B. Preston Co., Inc.*, 290 U. S. 163 (1933); *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U. S. 266 (1936).

Respectfully submitted,

GERTRUDE VANDERBILT WHITNEY and CORNELIUS VANDERBILT, *as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, Individually,*
Appellants, Petitioners,
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GLORIA LAURA MORGAN VANDERBILT, *Infant, Appellant, Petitioner, by Thomas B. Gilchrist, as General Guardian of Her Property,*
By THOMAS B. GILCHRIST,
Her Counsel.

THOMAS B. GILCHRIST, *as General Guardian of the Property of Gloria Laura Morgan Vanderbilt, Infant, Appellant, Petitioner;*

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His Counsel.

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EXHIBIT "A."

§ 249-r, *Gross estate.*

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this state):

1. To the extent of the interest therein of the decedent at the time of his death;

2. To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death, as dower, curtesy or by virtue of a statute creating an estate in lieu of dower or curtesy;

3. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (a) the possession or enjoyment of, or the right to the income from, the property or (b) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property made by the decedent within two years prior to his death, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this article;

4. To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the

enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death. For the purposes of this paragraph the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of five thousand dollars, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this article;

5. To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited with any person carrying on the banking business, in their joint names and payable to either or the survivor except such part thereof as may be shown to have originally belonged to such other person and never to have been received or ac-

quired by the latter from the decedent for less than an adequate and full consideration in money or money's worth; provided, that where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person; provided, further, that where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decendent and spouse, then to the extent of one half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants, and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

6. To the extent of any personal property belonging to a husband which passes to his widow by virtue of her survivorship because of the husband having placed such property in his and his wife's names with intent to create a right of survivorship in her;

7. To the extent of any property passing under a general power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, or (c) by deed under which he has retained for his life of for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth;

7-a. To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, or

(b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth, exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof.

8. To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life;

9. To the extent of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life, but only to the extent that such amount is required to be included in the gross estate under the provisions for the taxing of estates contained in any revenue act of the United States applicable to the estate of the decedent.

10. Subdivisions two, three, four, five, six, seven, eight and nine of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this article;

11. If any one of the transfers, trusts, interests, rights, or powers enumerated and described in subdivisions three, four and seven of this section is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

12. From the purposes of this article, a relinquishment or promised relinquishment of dower, curtesy or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

[NOTE.—The above text includes certain amendments not material to the present controversy.]

EXHIBIT "B."

Opinion and Decision of Surrogate Foley, Filed June 7, 1937.

(163 Misc. 667)

Estate of Alice G. Vanderbilt.

This is an appeal by the executors and by individual beneficiaries from the *pro forma* order of July 13th, 1936 fixing the estate tax upon the appraiser's report.

Cornelius Vanderbilt died on September 12th, 1899. Under his will, among other bequests, he gave to his wife, Alice G. Vanderbilt, the decedent here, a fixed annual income of $250,000. Provision was made for the setting aside of a trust fund of securities sufficient to pay that annual amount. He conferred upon her a limited power of appointment over the principal of the fund restricting her in her disposition to legacies to be given to their issue in such shares as she should direct in her last will. In default of the exercise by Mrs. Vanderbilt of this limited power, he provided that the fund be divided among their four children equally, with substitution in case of the death of any of them to their issue or to the surviyors where there was no issue of any deceased child.

Mrs. Vanderbilt died on April 22nd, 1934. Her will exercised the power of appointment by specific reference to the terms of her husband's will. She gave to her daughter, Gertrude V. Whitney $150,000, and to the issue of her deceased son, Alfred $500,000. Of the residue she gave one-third to the issue of her deceased son, Reginald, and the remaining two-thirds to her daughter, Gladys Szechenyi.

In his report in the pending estate, the tax appraiser has found the value of the fund at the date of the death of Mrs. Vanderbilt to have been $5,935,572.07. He has taken the full value of the fund without reference to any deduction for the value of the life estate of Mrs. Vanderbilt. He has added the full undiminished value to the personal estate left by her. The combined gross estate as found by him is $10,770,907.17. The net estate is fixed at $10,004,587.85. A tax has been assessed against the succession to this amount in the sum of $1,335,812.19. By the inclusion of the appointed fund the total tax has been increased by approximately $900,000, and the tax upon her personal estate has been increased by approximately $200,000.

The grounds of appeal are first that there was erroneously included as part of the decedent's gross estate the appraised value of the appointed fund, and second that there was erroneously included in the appraised value of the appointed fund, (a) the amount of the appointed legacy bequeathed by Mrs. Vanderbilt to her daughter, Mrs. Whitney, and (b) the amounts of the appointed legacies passing to the three children of her son Alfred. Upon the second ground of appeal these beneficiaries asserted a right to elect to take their shares under the donor's will and thereby to renounce the lesser benefits derived by them under the donee's will.

The second ground of appeal may be disposed of readily. It is sustained. The amounts payable to the designated legatees under the exercise of the appointment are less than they would have received had the power not been exercised. In default of the power they would have taken greatly increased shares under the will of Cornelius Vanderbilt. Under such circumstances the law is clear that they may elect to take under the will of the donor and not under the exercise of the power by the donee. (Matter of Ripley, 122 App. Div. 419, aff'd. 192 N. Y. 536; Matter of Slosson, 216 N. Y. 79; Matter of Taylor, 121 Misc. 7, aff'd. 209 App. Div. 299, aff'd 239 N. Y. 582.) By this disposition these legacies do not escape taxation for they become taxable in the estate of the donor in a proper proceeding. The amounts, however, of their respective shares must be eliminated from the gross estate of the decedent here and the tax recomputed. The *pro forma* order in this respect is therefore modified.

There remains for disposition the first ground of appeal. It is contended in the briefs of the appellants (1) that subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, under which the appraiser included the appointed fund as part of this decedent's gross estate, did not permit such inclusion; (2) that if that section did authorize such inclusion it is violative of both Federal and State constitutions since the State has attempted to tax property without due process of law by imposing a tax upon the exercise by the donee of a limited power of appointment; (3) that property passing under a limited power is not the property of the donee of the power and that by reason of the substitution by the Legislature in 1930 of an estate tax (Article 10-C) in place of the former transfer tax (Article 10) such property may not be included in the gross estate of the donee of the power; and (4) that if the fund be held taxable there should be deducted therefrom the value of the life estate of this decedent. All these contentions and the entire ground of appeal are overruled.

It is unnecessary to discuss at length the principles applicable to the taxation of powers of appointment which have been so clearly fixed by the Court of Appeals. These well established rules dispose of many of the arguments of the appellants. Briefly stated these rules are as follows: (1) the property passing under the exercise of a power of appointment is taxable in the donee's estate; (2) regardless of any technical question as to the donee's title it is the donee's exercise of the power that renders it taxable in his estate; (3) it is the exercise of the power rather than the creation thereof which effected the transfer and therefore no transfer is taxable until the power is exercised, or it is found that default in exercising the power has actually occurred; (4) the exercise of the power is taxable in the donee's estate even though at the time of the creation of the power there was no law in force taxing such transfers; (5) the Court of Appeals has drawn no distinction between *general* and *limited* powers of appointment and the latter are taxable in the donee's estate, when exercised; and (6) it is only where the donee of the power fails to exercise it that the fund or property subject to the power is referred back to the donee's estate for taxation.

Under the Transfer Tax Law prior to 1897, property passing, pursuant to the exercise of a power of appointment, was taxable only in the estate of the donor. (Matter of Stewart, 131 N. Y. 274.) That policy was changed by Chapter 284 of the Laws of 1897, which provided for the taxation of such property in the estate of the donee. This modification was accomplished by the addition of subdivision 5 to Section 220 of the Tax Law (enacted April 16, 1897). It was in effect at the date of death of Cornelius Vanderbilt on September 12th, 1899. Subdivision 5 provided:

> "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

Thereafter the Legislature by Chapter 76 of the Laws of 1899 (in effect March 14, 1899) amended Section 230 of the Tax Law to provide:

> "When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon such transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, out of the property transferred * * *."

The Court of Appeals held that the latter amendment in no way affected or repealed subdivision 5 of Section 220 set forth above. (Matter of Howe, 176 N. Y. 570.) At the date of death of Cornelius Vanderbilt, therefore, the Tax Law specifically provided for the imposition of the tax in the donee's estate in the event that the power was ex-

ercised. In the exaction of a tax under this section, the court did not differentiate between general and limited powers of appointment. The leading authorities have sustained the taxability of a limited power. (Matter of Vanderbilt, 50 App. Div. 246, aff'd. 163 N. Y. 597; Matter of Dows, 167 N. Y. 227, sustained *sub-nom* Orr *v.* Gilman, 183 U. S. 278; Matter of Howe, *supra;* Matter of Delano, 176 N. Y. 486; Matter of Wendel, 223 N. Y. 433.) The tax was imposed in the donee's estate even though at the time the power was created there was no law in force taxing such transfers. (Matter of Vanderbilt, 50 App. Div. 246, aff'd. 163 N. Y. 597; Matter of Dows, *supra.*) The same treatment was accorded powers created by deeds executed long before the existence of any transfer tax law. (Matter of Delano, *supra.*)

It will thus be seen that the contentions of the appellants in so far as they question the condition of the law existing at the date of death of Cornelius Vanderbilt in 1899 are without support in the authorities. A *limited* power of appointment was taxable in the donee's estate. Taxation was postponed until the death of the donee. The constitutional authority of the State to tax had been sustained by the United States Supreme Court in Chanler *v.* Kelsey, 205 U. S. 466 sustaining Matter of Delano, 176 N. Y. 486, Orr *v.* Gilman, 183 U. S. 278.

The addition of the appointed fund here to the individual property of Mrs. Vanderbilt was therefore proper.

Equally untenable is the contention of the appellants that the order which fixed the tax in the Estate of Cornelius Vanderbilt is *res judicata.* It is asserted in this connection that the failure to include a specific provision in the order in that estate suspending taxation until the death of the donee, was a complete and final adjudication that the appointive fund was forever exempt from taxation. It is also asserted that the Court of Appeals in its decision on the appeal from that order in some way held the transfer to be taxable only in the estate of the donor. Both of the claims find no support in the applicable law or in the actual adjudications in the tax proceeding in Mr. Vanderbilt's estate.

Upon the first contention it has been the law of this State for many years that the omission in the appraiser's report or in the order entered thereon, of a provision suspending taxation of the remainder of a fund is not an adjudication as to the exemption of the estate of the donee where the power was exercised or an adjudication as to the exemption of the estate from future taxation in default of the exercise of the power. (Matter of Naylor, 189 N. Y. 556, aff'g. 120 App. Div. 738; Matter of Duff, 114 Misc. 309, aff'd. 196 App. Div. 969; Matter of Goldenberg, 187 App. Div. 692; Matter of Bucki, 172 App. Div. 455; Matter of Seligmann, 170 App. Div. 837; Matter of Carey, 197 App. Div. 566, aff'g. 115 Misc. 732 on opinion below; Matter of Jesup, 155 Misc. 846.) It was the practice in the Surrogate's Courts throughout the State after the enactment in 1897 of Section 220, subdivision 5, to make a simple order taxing the actual transfers in the donor's estate. The existing law itself provided for taxation in the event of the exercise or non-exercise of the power. (Matter of Howe, *supra.*) The mention of postponement or suspension in the order was therefore unnecessary. In 1899 when Mr. Vanderbilt died there was no specific provision for suspension in the statute. That provision came into the law in 1911 (Chapter 800, Laws of 1911, in effect July 28, 1911) with respect to taxing contingent remainders and suspending the tax until the actual eventuality became fixed. These amendments and the cases which construe them, however, have no application to the present estate except as historical interest. (Matter of Zborowski, 213 N. Y. 109; Matter of De Cordova, 199 App. Div. 492, aff'd, 234 N. Y. 514.) In Matter of Duff, Matter of Naylor and Matter of Goldenberg cited above, there was no express provision for suspension in the original order but its absence in each of these cases was held not to preclude the fixation of the tax in subsequent years under statutory authority. It is stated in Matter of Goldenberg, *supra*, that the circumstance that the order is silent as to a transfer or estate does not bar the parties interested from asserting their right in a subsequent proceeding "for the only matters that are *res judicata* are those embodied in an order or judgment and not those omitted therefrom" (187 App. Div. 692, at page 696).

Here, taxation of the remainder was properly held in abeyance and the mere statement in the appraiser's report of the valuation of the remainder of the fund was sufficient to indicate that the right to tax was reserved by the State for future determination. The defense of *res judicata* is not available to the executors or legatees on this phase of the case.

Upon the alternative ground urged as *res judicata*, neither the record in Matter of Vanderbilt, 172 N. Y. 69, nor the determinations of the lower courts, nor the decision of the Court of Appeals sustain the executors' contentions that the final determination in that proceeding is conclusive in the present proceeding. The Court of Appeals did not hold that a tax should have been imposed in the donor's estate upon the appointive fund. There is no indication whatsoever in its opinion that the transfer was declared taxable in that estate. The appeal of the State Comptroller whereby he sought to tax the appointive fund presently in the donor's estate was abandoned before the case reached the Court of Appeals. The final determination of that Court did not affect the fund involved in this proceeding. It was the residuary trust fund that was considered, which, as stated by Chief Judge Cullen in his analysis of the *Vanderbilt* decision, in Matter of Burgess (204 N. Y. 265 at page 269) contained "no power of appointment". The decision only sustained the validity of Section 230 of the Tax Law and held that under its provisions the tax on the contingent residuary interests was immediately payable out of the estate to be computed at the highest rate at which under any contingency the property might be taxable.

Undoubtedly, if the Court of Appeals had been asked to rule upon the alleged contradiction between the terms of Section 230 and Section 220 of the Tax Law it would have held in Matter of Vanderbilt, as it subsequently held in Matter of Howe, 176 N. Y. 570, that the amendment of Section 230 did not repeal or nullify the provisions of Section 220. It would have held that property passing under a power of appointment should be taxed in the donee's estate as the section directed just as if the donee of the power was the owner of the property. It would have held

further just as it did in Matter of Howe, *supra*, that the remainders were not taxable until the death of the donee and the final ascertainment of exercise or non-exercise. Furthermore on the question of *res judicata* the order entered in the Surrogate's Court on the remittitur of the Court of Appeals and upon the stipulation of the parties contained no reference to the taxability of the appointive fund or its exemption. At the time of the preparation and entry of that order there must have been a complete and proper understanding by the attorneys, both for the State and the estate, of the reservation of the right of the State to tax in a subsequent proceeding.

The remaining contention of the appellants involves the interpretation of subdivision 7-a of Section 249-r of the Tax Law and its applicability to the estate of the donee. That section provides in general as to the manner of the valuation of the gross estate and in particular for the inclusion within it of certain special types of property. The opening sentence of the Section reads:

> "*Gross Estate.* The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *."

Then follow the enumeration and description of the special kinds of property. Subdivision 7-a of the Section reads:

> "To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, * * * exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

The history of this enactment throws light upon its meaning. When the Decedent Estate Commission, in cooperation with

the State Tax Commission, drafted the new Estate Tax Law, the context and policies followed in great part those of the Federal Estate Tax Statutes. The recommendation of the two Commissions was adopted by the Legislature and became Article 10-C of the Tax Law. It became effective on September 1st, 1930. Prior to that date Section 220 of the Tax Law authorized the imposition of a tax in the donee's estate upon the exercise of a power of appointment whether general or limited. The new Estate Tax Law, beginning at the date mentioned above, imposed a tax in the donee's estate only upon the exercise of a *general* power of appointment. Such was the Federal policy. Limited powers were exempted from taxation by the omission of any express statutory authority to tax them.

In respect of the policy of New York State to tax limited powers in the estate of the donee it was apparent that the terms of the new statute of 1930 substantially changed the previous rule and permitted such powers to escape taxation in the donee's estate. Thereupon the State Tax Commission drew the provisions of subdivision 7-a to supplement subdivision 7 which taxed only general powers. The new subdivision 7-a became effective on March 21, 1932. Mrs. Vanderbilt died on April 22, 1934. If her death had occurred between September 1, 1930 and March 21, 1932 the fund here would have been free from taxation. Its succession could not have been taxed in the donor's estate, because the statutory provisions in existence at the date of Cornelius Vanderbilt's death made it taxable, if the power was exercised, only in the estate of the donee. (Section 220.) It could not have been taxed as part of the estate of Mrs. Vanderbilt because it was a limited or special power and its succession was exempt. An explanatory memorandum of the State Tax Commission prepared at the time of the drafting and introduction of the legislative bill has been submitted to the Surrogate by consent of the parties. It is illuminative of the reasons which led to the enactment of new subdivision 7-a. The State Tax Commission pointed out that the existing law in 1932, prior to the enactment of the subdivision, permitted the fund to escape taxation in both the estate of the grantor and the estate of the grantee of the power. It was stated in reference to the measure:

"This bill provides that property transferred by the exercise of a special or limited power of appointment shall be included in the decedent's gross estate for the purpose of the present estate tax in the event that it is not taxable or has not been taxed in the estate of the grantor of the power and thus insures that one death tax will be imposed upon such property."

Entirely aside from this memorandum, as I construe the legislative intent in the enactment of the subdivision, it provided for the inclusion in the gross estate of the donee of property passing under a special or limited power of appointment under the exact terms of the power exercised by Mrs. Vanderbilt and given to her under the will of her husband. The subdivision may be paraphrased as follows: (1) if the original grantor's estate was subject to a tax and impliedly that tax had been paid, no further tax would be imposed under the terms of the subdivision in the donee's estate; (2) if the estate of the grantor would have been taxable except for a statute, which provided that the tax on the transfer of the property should be imposed in the estate of the grantee, taxation of the fund under the subdivision must be enforced in the grantee's estate when the power is exercised.

This latter statement covers the exact situation in Cornelius Vanderbilt's estate. If Section 220 had not been in existence the tax would have been imposed under Section 230 upon the appointed fund in his estate. The application of Section 220 provided the alternative mentioned in subdivision 7-a for the assessment of the tax in the grantee's estate and exempted the estate of Mr. Vanderbilt from taxation in the event of the exercise of the power. It should be noted in this aspect of the case that counsel for the appellants in their briefs have overlooked those decisions which have held that in default of the exercise of the power, a tax could have been imposed validly in the estate of the grantor. (Matter of Naylor, 189 N. Y. 556; Matter of Duff, 114 Misc. 309, aff'd. 196 App. Div. 969 on the opinion of the Surrogate; Matter of Goldenberg, 187 App. Div. 692.)

Moreover Matter of Burgess, 204 N. Y. 265, cited by them instead of supporting their claims sustains the opposite con-

clusion reached by the Surrogate. That case only applied to a power that was contingent, because the right to appoint given by the terms of the will was subject to such conditions that it might never come into existence. In that case the present taxability in the donor's estate was therefore sustained. There were certain trusts, however, in the estate where the powers were vested and not contingent. The Court held that the funds affected by such powers were not presently taxable. Taxation was postponed until exercise and was necessarily required to be assessed in that event in the donee's estate.

The power given by Mr. Vanderbilt to his wife was a *vested* power and not a *contingent* power. It was subject to no conditions or contingencies except the choice of his wife to exercise it or not. The latter privilege did not affect the inherent nature of the power as absolutely vested in her. Matter of Burgess, *supra*, is therefore authority for the conclusion reached by the Surrogate.

Finally there is no unconstitutionality in the inclusion by the Legislature of a statutory declaration that a fund subject to a *limited* power shall be deemed to be part of the grantee's property. I have pointed out that the question of the constitutionality of the legislative authority to levy that form of taxation was set at rest many years ago by the United States Supreme Court. (Chanler *v.* Kelsey, 205 U. S. 466, sustaining Matter of Delano, 176 N. Y. 486; Orr *v.* Gilman, 183 U. S. 278, sustaining Matter of Dows, 167 N. Y. 227; Matter of Zborowski, 213 N. Y. 109.)

It is the exercise of the power which is the basis of the authority to tax. The Legislature for taxing purpose has created artificial estates which include items clearly not owned in title or in fee by the decedent. Thus it has included by definition insurance on the decedent's life payable to a designated beneficiary and accruing only at the death of the insured. Irrevocable trusts, in which the decedent has only retained a life interest are included in the gross estate. Similarly, interests in *inter vivos* trust funds where the enjoyment is subject to change by the exercise by the decedent of a power to alter, amend or revoke are included. The privilege to transmit the appointed fund by will is one conferred by the State. By taxing the privilege the Legislature

in its exactments violates neither the Federal or State Constitution.

It is within the authority of the Legislature not only to declare the appointive property to be a part of the estate of the grantee, but also to make the passing of such property subject to the rates of tax in force at the date of death of the grantee; to provide for the exemptions to certain relations and charities at that time and not at the time of the death of the grantor; to fix the rates of tax based upon the relationship of the beneficiaries to the donee and not to the donor; to combine the individual property of the donee with the appointed property in order to compute the rate of tax; to tax the property in its character, realty or personalty, as it exists at the date of death of the donee and to fix its value as of that date rather than at the date of death of the grantor. (Matter of Dows, 167 N. Y. 227; Matter of Sandford, 250 App. Div. 310, N. Y. L. J. March 13, 1937; Matter of Rogers, 71 App. Div. 461, aff'd on opinion below 172 N. Y. 617; Matter of Walworth, 66 App. Div. 171; Matter of Seaver, 63 App. Div. 283; Matter of Duryea, 250 App. Div. 305, N. Y. L. J. March 13, 1937; Matter of Bucki, 172 App. Div. 455.)

For similar reasons, the statutes in existence at the date of death of the donee determine the amount of the appointive fund and whether it is to be taxed undiminished or diminished by the value of the life estate of the life tenant. The contention of the appellants that the value of the securities within the fund at the date of the death of Mrs. Vanderbilt—$5,935,572.07—must be reduced by the deduction of the value of her life estate is overruled. The statute in effect in 1934 at the date of her death made no provision for such deduction. The whole fund as it exists at the date of death of the donee must be included in the gross estate. Similar contentions as to parallel prior statutes have been overruled by the courts. (Matter of Bucki, 172 App. Div. 455; Matter of Seligmann, 170 App. Div. 837.) Since the law in effect at the date of the death of the donee applies, it is likewise immaterial whether the form of tax effective as of that date is a transfer tax or an estate tax. (Matter of Wendel, 223 N. Y. 433; Matter of Keeney, 194 N. Y. 281; Keeney *v.* N. Y., 222 U. S. 525.)

The difference between the two forms of tax is inconsequential. Simplicity in the method of assessment was effected by the enactment of the Estate Tax Law in 1930. The ultimate charge of the tax against the respective shares is practically the same under both systems of taxation. When the Estate Tax Law was adopted by the Legislature there was also enacted as part of the general program, new Section 124 of the Decedent Estate Law which provides, (in the absence of a contrary direction in the will) for the equitable apportionment and charging of the tax out of the benefits received by the respective legatees. The tax is imposed under either method upon the privilege to transmit the property by the will of the donee. The privilege may be given or withheld by the State.

The value of the diminished remainder set forth in the appraiser's report in the estate of Cornelius Vanderbilt and the order entered upon it is not conclusive here. The Surrogate was without jurisdiction to fix the value of such remainder in that proceeding. The Surrogate and the appraiser were limited to the valuation of the life estate. (Matter of Naylor, 189 N. Y. 556, aff'g. 120 App. Div. 738; Matter of Bucki, 172 App. Div. 455, 457; Matter of Seligmann, 170 App. Div. 837.)

Submit order on notice overruling the first ground of appeal and sustaining the second ground of appeal and modifying the order fixing the tax in accordance with the provisions of this decision.

J. A. E.

EXHIBIT "C."

In the Matter of the Appraisal under the Estate Tax Law of the Estate of ALICE G. VANDERBILT, Deceased.

GERTRUDE VANDERBILT WHITNEY et al., as Executors of ALICE G. VANDERBILT, Deceased, et al., Appellants; STATE TAX COMMISSION and GERTRUDE VANDERBILT WHITNEY, Individually, Respondents.

(Decided July 11, 1939.)

APPEAL from an order of the Appellate Division, first department, affirming an order of the Surrogate determin-

ing the value of the estate of the decedent for the purpose of the estate tax imposed by article 10-C of the Tax Law.

Arthur A. Ballantine, Roy C. Gasser, Thomas B. Gilchrist, Horace R. Lamb and *Leo Gottlieb* for Gertrude V. Whitney et al., as executors, et al., appellants.

Thomas B. Gilchrist and *Hampton D. Ewing, Jr.*, for Thomas B. Gilchrist, as general guardian of the property of Gloria L. M. Vanderbilt, an infant, appellant.

Mortimer M. Kassell and *Harry T. O'Brien, Jr.*, for State Tax Commission, respondent.

LEHMAN, J. Alice G. Vanderbilt died on April 22, 1934. Her "gross estate" was appraised at $10,120,907.17. Deductions of $766,319.32, allowed by statute, left a "net estate" of $9,354,587.85. A transfer tax measured by that "net estate" has been assessed. The decedent was the widow of Cornelius Vanderbilt, who died in September, 1899. By his will Cornelius Vanderbilt created a fund to provide an income of $250,000 to his wife during her lifetime. He directed that at the death of his wife "the principal set apart * * * to create the annual payment of two hundred and fifty thousand dollars to my wife, shall be given to our children, Gertrude, Alfred G., Reginald C. and Gladys Moore; and if any then be dead, to their issue, in such proportions and amounts as my said wife may direct or appoint in her last Will and Testament, and in default of such appointment the same shall be divided among our said four children equally, share and share alike, the issue of any such child or children to take its parent's share, *per stirpes* and not *per capita*." The decedent Mrs. Vanderbilt exercised the power of appointment conferred upon her. At her death the fund which was subject to that power was appraised at $5,935,572.07, and the full amount was included in the decedent's taxable estate by the tax appraiser. This, the appellants contend, was error.

By the exercise of her power of appointment the decedent gave to one daughter and the issue of a deceased son far more than they would otherwise have received under the will of Cornelius Vanderbilt, thus correspondingly reducing the amount which the other daughter and the issue of the other son would have received if she had failed

to exercise her power. The legatees, who received less through the exercise of the power than they would otherwise have received, have asserted a right to elect to take under the will of the creator of the power. The Surrogate has sustained their right to such election and the State does not challenge that ruling. Their legacies, then, are taxable, if at all, as part of the estate of Cornelius Vanderbilt, the donor of the power, and the amounts which they have received have been eliminated from the gross estate of Mrs. Vanderbilt, the donee of the power. (Cf. *Matter of Duryea*, 277 N. Y. 310.) Upon this appeal the question is whether the shares of the trust fund passing to the other daughter and grandchildren in accordance with the exercise of the power of appointment by the donee of the power were properly included in the gross estate of Mrs. Vanderbilt subject to tax as part of her estate. The shares so included constitute the major portion of the trust fund and more than half of the estate of Mrs. Vanderbilt, the donee of the power.

The property which was included in Mrs. Vanderbilt's estate did not at any time belong to her. It did not at her death pass *from* her to those whom she appointed to take. Her power of appointment was not general. By its exercise she could obtain no benefit for herself, her creditors or her estate. During her life the fund was held by trustees under the terms of the will of Cornelius Vanderbilt. She enjoyed under his will a life interest in the fund, and a tax measured by the value of that life interest was paid upon the death of Cornelius Vanderbilt. The remainder, which would vest in others upon her death, was not included in the tax assessed upon the transfer of his property. Mrs. Vanderbilt might, by exercise of her power of appointment, determine the shares which members of a limited group defined by the will of Cornelius Vanderbilt should receive out of property in the estate of Cornelius Vanderbilt and held by trustees under his will. When she exercised that power she gave her appointees nothing which belonged to her and she relinquished no rights which she might have asserted for herself. Nevertheless, the transfer of that property has been taxed in her estate and not in the estate of Cornelius Vanderbilt. The tax so imposed is many

times greater than it would have been if the transfer had been taxed in the estate of the donor of the power. The appellants maintain that the Tax Law (Cons. Laws, ch. 60), property construed, does not authorize the inclusion in the taxable estate of Mrs. Vanderbilt of property which was in no real sense a part of her estate, and that the Legislature could not authorize its inclusion without violation of restrictions placed by the Constitution of the United States upon the legislative power. The questions raised require a detailed statement and analysis of the history of the statutes of the State imposing death duties and of the proceedings had in fixing the tax upon the estate of Cornelius Vanderbilt in accordance with the statute in effect at his death.

The Tax Law then in effect (Laws of 1896, ch. 908), as amd. by Laws of 1897, ch. 284) provided that "a tax shall be and is hereby imposed upon the transfer of any property * * * in the following case:

"1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state. * * *

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." (§ 220, subds. 1 and 5.)

We are concerned primarily with those provisions of the statute which might apply to taxation of transfers of property effected through the exercise of a power of appointment by the donee of the power. We are not concerned with those provisions of the statute which might apply where there has been a failure to exercise such a power.

Thus when the tax was assessed on the estate of Cornelius Vanderbilt though the life estate passing under the testator's will to his wife was at that time subject to a tax as part of his estate, the transfer of the fund at the death of his wife, either by her exercise of the power of appointment conferred upon her or, upon her failure to exercise that power, in accordance with the terms of the will of the donor of the power was declared by the statute to be taxable only at the date of the death of the donee of the power "in the same manner as though the property * * * belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." The statute, it is clear, is not intended to draw any distinction between general powers of appointment and special or non-beneficial powers. It applies to every form of power. It was so construed and applied in assessing the tax upon the transfer of the estate of Cornelius Vanderbilt, and we are not referred to any case in which any other construction was urged "where there is an absolute gift of a power of appointment." (Cf. *Matter of Burgess*, 204 N. Y. 265, 270.) Such an absolute gift of a power of appointment was made here. Even though choice by the donee of the power was limited to a small group of persons and there may have been a theoretical possibility that none of that group would be in existence at the time fixed for the exercise of that power, yet under all possible circumstances the property was "certain to pass under the exercise or non-exercise of the power of appointment," and, therefore, the transfer was taxable in the estate of the donee. That would not be true where the gift of the power is to take effect only in contingencies which might never arise. In that respect this case differs from *Matter of Burgess* (*supra*), where the testator himself chose the persons to whom remainders should pass in certain contingencies, and conferred a power of appointment upon his trustees only if those contingencies did not arise.

The property affected by the power contingently given was in that case included in the taxable estate of the donor of the power, for otherwise, if the contingency upon which the gift of the power was to become effective should not arise, the transfer would not, under the statute, have been subject to any tax.

It should perhaps be added that until 1930 there was little, if any, reason based on any practical consideration why there should be differentiation between general powers of appointment and limited or non-beneficial powers. All transfers of the property of residents of the State by will or by the intestate laws were to be taxed. Transfers effected directly by the will of the resident owner were, of course, to be taxed in the estate of the testator; transfers effected by exercise of a power appointment conferred by such will were to be taxed as if the property had belonged to the donee of the power. The rate of taxation was not then measured by the size of the decedent's estate and would not be affected by the provision of the statute that a transfer of that property by the exercise of a power of appointment should be taxed as part of the estate of the donee of the power rather than of the donor. That provision was, then, hardly more than a new and convenient rule of administration. Under earlier statutes, taxing transfers by decedents, this court had held that "where the donee of the power has the right of selection, the interest appointed vests in the appointee at the time of the appointment, but his title relates to and is acquired under the instrument creating the power," and is taxable as part of the estate of the donor. (*Matter of Stewart*, 131 N. Y. 274, 281.) Even then it was necessary to postpone assessment and collection of the tax until the death of the donee, for under the earlier statutes it was held, too, that contingent remainders, or remainders which, though technically vested, were defeasible, could not be taxed until they vested indefeasibly. (*Matter of Curtis*, 142 N. Y. 219; *Matter of Burgess, supra.*) By taxing transfers of property effected through exercise of a power of appointment as if the property had belonged to the donee of the power rather than to the donor, the tax procedure was simplified, and at times the administration of the estate of

the donor could be closed earlier than would otherwise have been possible.

The Tax Law was further amended by chapter 76 of the Laws of 1899 so as to provide: "When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article." (§230.) In accordance with these provisions, which went into effect a short time before the death of Cornelius Vanderbilt, contingent estates or interests created by his will were taxed tentatively at the highest possible rate. (*Matter of Vanderbilt*, 172 N. Y. 69.) Such contingent estates then taxable did not, however, include any estate or interest in the trust fund to which Mrs. Vanderbilt's power of appointment related, for in construing the statute this court had held that "it is the exercise of the power * * *, which effects the transfer which the statute makes taxable," and that section had no application in such case. (*Matter of Howe*, 86 App. Div. 286, 288; aff'd on opinion below, 176 N. Y. 570.)

The State regulates succession to a decedent's property. It permits an owner to provide by will to whom his property shall be transferred upon his death. He may appoint the person to whom the property shall go or he may give to another a power of appointment to be exercised at some future time. If the donee of the power is given a life interest in the property and a general power of appointment which he may exercise for his own benefit, his rights of enjoyment and control are closely analogous to the rights of an owner. Even then, however, it remains theoretically true that the property does not become his and by exercise of the power of appointment he transfers to the appointee a title which relates back to the instrument creating the power.

The statutory rule ignores all such theoretical considerations when it requires that a transfer effected through exercise of the power of appointment shall be taxed "in

the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." The statutory rule was, nevertheless, based soundly upon practical considerations which the Legislature decided should control. "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." (*Matter of Dows*, 167 N. Y. 227, 231; affd. *sub nom., Orr* v. *Gilman*, 183 U. S. 278.) For that reason this court held that a tax may be imposed upon a transfer effected through exercise of the power, and that is true though "there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made and the power was created. That transfer is not taxed, and the statute makes no effort to reach it. It is the practical transfer through the exercise of the power by will that is taxed and nothing else." (*Matter of Delano*, 176 N. Y. 486, 494.) In affirming that decision the Supreme Court of the United States pointed out that: "It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others. Notwithstanding the common-law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title." (*Chanler* v. *Kelsey*, 205 U. S. 466, 474.) The statutory rule treating the execution of the power as the real source of title is, therefore, not arbitrary; at least, so long as the tax is not measured by the size of the estate of the person who makes the transfer. Mere postponement of the assessment of the tax is not a ground for complaint to the court. That is true even though the rate of taxation might be changed in the interval between the death of the donor of the power and the death of the donee or even though in the interval the tax laws were so amended that transfers previously not taxable were subjected to a tax. (*Matter of Dows, supra.*) Indeed, the appellants do not claim invalidity of the statutory rule on

such ground; they claim it is invalid as applied in this case on grounds which we shall hereafter consider.

We point out here, again, that we are concerned only with a transfer effected by the exercise of a power of appointment, not with any transfer upon failure to exercise such power. A statutory rule that whenever the donee of a power shall omit or fail to exercise it, a transfer shall be deemed to take place as though the persons becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power taking effect at the time of such omission or failure, is without any foundation either in fact or in theory. In such case the donee of the power transfers nothing to the person who succeeds to the property of the donor of the power in accordance with the will of the donor or the intestacy laws in effect at his death. Therefore, this court held that the part of the statute was invalid which purported to tax in that manner succession to property through failure to exercise a power. (*Matter of Lansing*, 182 N. Y. 238.) That decision did not affect the provisions of the Tax Law for the taxation of transfers through exercise of the power. To conform to that decision the Legislature then amended section 220 of the Tax Law by omitting the provision for the taxation of transfers upon failure to exercise a power of appointment but left intact the provision for taxation of transfers effected through exercise of a power. (Laws 1911, ch. 732.) That provision is still part of the Tax Law (§220, subd. 4), though no longer applicable to persons dying on or after September 1, 1930.

It thus appears plain that the transfer of the fund, created by the will of Cornelius Vanderbilt, to provide an income for his wife during her lifetime, which took effect at her death, was not subject to a death tax in the estate of Cornelius Vanderbilt, because at the time of his death the statute provided that the tax on such a transfer, effected by exercise of a power of appointment, should be imposed in the estate of the donee of the power. It would have been imposed in the estate of Mrs. Vanderbilt, the donee of the power, if she had died before September, 1930, and no effective challenge could have been made to a tax so imposed.

Prior to her death, however, the Legislature, by chapter 710 of the Laws of 1930, added article 10-C to the Tax Law, which substituted, in respect to persons dying after it took effect, an estate tax similar to the Federal estate tax (in place of the tax imposed by the earlier statute which we have described as an inheritance tax; *Matter of Cregan*, 275 N. Y. 337.) That involves, it has been said, a "distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death." (*Knowlton* v. *Moore*, 178 U. S. 41, at p. 77.) The older inheritance tax might be described as a tax on the privilege of receiving property on the death of another, and the new estate tax as a tax on the privilege of transmitting property upon death. (*Coolidge* v. *Long*, 282 U. S. 582.) These differences are not merely theoretical. They may carry practical consequences. The rate of the older inheritance tax was measured by the size of the interest received by the individual; the rate of the estate tax is measured by the size of the estate left by the decedent passing to few or many in accordance with the decedent's will or the intestacy laws. An *inheritance* tax, measured by the size of the interest *received* by an individual through the exercise of a power of appointment, though imposed in the estate of the donee of the power as if the transfer had been made by the donee of the property owned by him, produces no arbitrary inequality even where the power of appointment is a non-beneficial power and refers to property never owned by the donee. An estate tax measured by the size of the estate *transmitted* to others upon the owner's death might, however, produce unjust inequality if the law arbitrarily includes for such purpose any property which is in no real sense a part of the estate in which it is taxed. Accordingly, though the earlier "inheritance tax" statutes made no distinction between transfers effected through exercise of a general power of appointment and transfers effected through exercise of a limited or non-beneficial power, the statute of 1930 modelled upon the Federal estate tax laws incorporated a distinction previously drawn in the Federal statutes between transfers made through the exercise of "general" powers of appointment and transfers

through the exercise of limited powers. It provided that the value of the gross estate of a decedent subject to the tax shall include the value of "any property passing under a *general* power of appointment exercised by the decedent." (§249-r, subd. 7.) The value of property passing under a *limited* power of appointment would thereafter be included in the value of the estate, subject to tax, of the donor of the power.

That left a gap in the Tax Law, through which a transfer effected thereafter by exercise of a limited power of appointment created by will of a testator dying before the statute took effect would escape all taxation. To fill in that gap the Legislature, by chapter 320 of the Laws of 1932, added subdivision 7-a to section 249-r to provide that the value of the gross estate of a person dying thereafter should include the value of all property "passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed * * * intended to take effect in possession or enjoyment at or after, his death, * * * provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

It is plain that the purpose of the new subdivision was to restore the old rule that a transfer of property under a limited power of appointment exercised by a decedent should be taxed in the estate of the grantee of the power, in the small class of cases where otherwise the transfer would escape taxation. In those cases, the rule formulated in respect to an inheritance tax is to be applied now to an estate tax where the rate is measured by the size of the estate of the grantee of the power; and we are told that where, as in this case, the grantee did not own the property and the power of appointment could not be exercised by the grantee for his own benefit, such a tax produces a result so arbitrary and unjust that it would violate the provisions of the Fourteenth Amendment of the Constitution. At least, it is said, the validity of such a tax would be so doubtful

that the statute should be construed in manner which would avoid the doubt.

We are urged for that reason to limit the words "property passing under a power of appointment" to property in which the decedent had or could acquire a beneficial interest, and for analogy and precedent we are referred to a series of cases in the Federal Court exemplified by *Helvering* v. *Parker* (84 Fed. Rep. [2d] 838), where the courts have held that the Federal Estate Tax Law (§ 302-g; U. S. Code, tit. 26, § 411, subd. [g]), requiring the inclusion, in a decedent's taxable estate, of the proceeds of life insurance policies "taken out by the decedent upon his own life" did not apply where the insured reserved no right to surrender and cancel the policies, to pledge them for loans or to dispose of their proceeds for his own benefit during his life and no other beneficial right incidental to ownership or control. (Cf., also *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Helvering* v. *Helmholtz*, 296 U. S. 93; *White* v. *Poor*, 296 U. S. 98.)

"A statute must be construed, *if fairly possible*, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." (*United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; cf. *Knowlton* v. *Moore*, *supra*, at p. 77.) Tax statutes "*in case of doubt* * * * are construed most strongly against the Government, and in favor of the citizen." (*Gould* v. *Gould*, 245 U. S. 151, 153.) (Italics in both cases are ours.) Here, however, the purpose of the statute is clearly expressed and the construction urged upon us is not "*fairly possible*." The original statute made no distinction between beneficial or general power and limited or non-beneficial powers. The new statute does make the distinction between "general" powers and other powers, but it is clear that a transfer under any power of appointment, not general, which was taxable under the old statute in the estate of the donee of the power is intended to be so taxable also under subdivision 7-a of section 249-r. We cannot give to the statute a more limited application. If the subdivision does not apply in this case the passing of title to this property will escape taxation. That was not the legislative intent.

The serious question in this case is whether the tax violates the Constitution of the United States. The State has a broad power of taxation, but in the exercise of that power it may not provide a measure for a tax which is entirely arbitrary and which produces inequality and injustice so great as to deprive a taxpayer of the equal protection of the law. So it has been held that "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment." (*Heiner* v. *Donnan*, 285 U. S. 312, 325.) Taxation, it has often been pointed out, is an intensely practical matter. The Legislature may not arbitrarily fix the measure of a tax by a fiction. (*Hooper* v. *Tax Commission*, 284 U. S. 206.) Always there must be some reason based on fact, not fiction, for imposing a particular tax upon a particular class, and absence of any basis for the classification may not be hidden by an arbitrary creation of a conclusive presumption. (*Schlesinger* v. *Wisconsin*, 270 U. S. 230.) The Supreme Court has authoritatively stated the rule which in such cases creates invalidity: "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment." A statutory rule is beyond the power of the Legislature if the result would be "that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in fact by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description." (*Heiner* v. *Donnan*, *supra*, p. 327; cf. *Nichols* v. *Coolidge*, 274 U. S. 531; *Free* v. *Bowers*, 12 Fed. Rep. [2d] 625.)

The standard of what is arbitrary and unreasonable is not rigid. As we have often pointed out, the question is usually one of degree. A difference in the facts, seemingly slight; an emphasis on one factor rather than another, may produce varying results. Even in the cases cited there was division of opinion in the court, though the difference of opinion concerned only the application of the general rule. The rules are too well established to be challenged. The

facts present in this case are so different from those presented in the cited cases that they furnish at best imperfect analogies.

In considering the validity of the tax three factors must constantly be kept in mind: the nature of the tax, the measure of the tax and its incidence. Perhaps repetition is unnecessary, but we again point out that the statute in effect at the death of Cornelius Vanderbilt imposed no tax upon an inchoate transfer of a decedent's property to be effected thereafter by exercise of a power of appointment. Under that statute and under the present statute "it is the practical transfer through the exercise of the power by will that is taxed and nothing else." (*Matter of Delano, supra*, p. 494.) In 1932, when the Legislature enacted subdivision 7-a of section 249-r, the "practical transfer" had not been made. The Legislature was free at that time to impose a tax upon such transfer by a decedent dying thereafter, even if the earlier tax statute had imposed no such tax. (*Chanler v. Kelsey, supra.*) The Legislature chose to lay an "estate" tax measured by the aggregate of the property which was in a *practical* sense transferred by the will of the grantee of the power. Though the tax is paid out of the estate of the decedent, the Decedent Estate Law (Cons. Laws, ch. 13) provides that the tax so paid "shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." (§ 124.) We may, therefore, properly assume that Mrs. Vanderbilt's appointees will ultimately bear the main burden of the tax in proportion to the property received.

Since an estate tax is an excise laid in respect to the privilege of transmitting property rights at death (*Coolidge v. Long, supra*), it can hardly be said that the statutory rule that the rate of the tax should be measured by the aggregate of the property so transmitted is entirely without basis in fact, even though the decedent did not own some of the property but merely had a limited power of appointment. In the cases cited by the appellants property was included in the aggregate which measured the tax, though it was not transmitted to others at the death by the decedent. In those cases death did not result "in a shifting, or in the comple-

tion of a shifting * * * of any economic benefit of property, which is the subject of a death tax." (*Heiner* v. *Donnan, supra*, p. 323.) Thereby arbitrary choice to include in the "estate" of the decedent property which did not pass at the decedent's death to which the estate was in no way related and from which the estate derived no benefit, the Legislature increased the rate of taxation upon the transfer of property which the decedent owned and transmitted. In the case we are now considering, no property is included in the aggregate which measured the tax which does not pass at Mrs. Vanderbilt's death to persons who take the property only because she so provided in her will. True, the inclusion of that property in Mrs. Vanderbilt's estate increases the rate of the tax which must be paid ultimately by those to whom the property *owned* by Mrs. Vanderbilt was transferred, as well as the tax which must be paid ultimately by those who receive property over which she had a limited power of appointment. Argument may be made that such a tax is not fair; indeed, the fact that under the Federal statute only a transfer of property under a general power of appointment is taxed in the estate of the grantee of the power indicates that Congress believed that it is fairer, as a general rule, that transfer under limited powers should be taxed in the estate of the grantor of the power. Such "unfairness" does not, however, render the statute invalid.

The ultimate burden of an estate tax rests upon the persons to whom the estate is transferred. Since the tax is measured by the total transferred to one or many, each pays a tax measured, not by the benefit he receives, but in some degree by the benefit others receive. Argument might be made that all estate taxes are to that extent unfair, but estate taxes are not open to challenge on such ground. The question is always whether the classification is reasonable; incidental hardship resulting from a reasonable classification is no ground of attack. If an estate tax upon the transfer through the exercise of the power of appointment by Mrs. Vanderbilt were imposed *now* in the estate of Cornelius Vanderbilt in accordance with provisions of article 10-C, perhaps the tax would be as large as if imposed in the estate of Mrs. Vanderbilt. The great disparity in the amount of

the tax imposed in the estate of Mrs. Vanderbilt and the amount of the tax if imposed in the estate of Cornelius Vanderbilt is due to the fact that a tax in the estate of Cornelius Vanderbilt would be measured in accordance with the statute in effect at his death, though, as we have pointed out, the tax is upon the transfer effected by Mrs. Vanderbilt's will and should be taxed in accordance with statutes in force at her death. Its inclusion in an estate tax, measured by the aggregate of the property transferred under her will, is not so unreasonable that it may be challenged in the courts.

The classification so made applies only to transfers under a limited power of appointment created by the will of a person dying prior to September 1, 1930. Transfers under such powers created by persons dying thereafter would be subject to a tax measured in a different way—and such tax might be higher or lower but would not be the same. That, it is said, denies to the taxpayer the equal protection of the law. In urging that contention the appellants lean heavily on the case of *Binney* v. *Long* (299 U. S. 280). In that case the Legislature based discrimination upon whether a transfer was made before or after a date which it arbitrarily chose. In the instant case the discrimination is not based upon a date arbitrarily selected but is a logical solution by the Legislature of a problem which it was required to meet. The discrimination, as we have already said, is between a transfer under a limited power of appointment theretofore granted and a transfer under such a power thereafter granted, and it was calculated to prevent transfers thereafter effected under powers theretofore granted from escaping all taxation. That is not an arbitrary discrimination.

Other objections raised by the appellants have been rejected after careful consideration. We do not extend this opinion further by detailed analysis.

The order of the Appellate Division should be affirmed, with costs.

O'Brien, Hubbs, Loughran, Finch and Rippey, J. J., concur; Crane, Ch. J., taking no part.

Order affirmed.